IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 23, 2009

STATE OF TENNESSEE v. ANDREW LYNN KENDALL

Appeal from the Criminal Court for Knox County
No. 88276 Mary Beth Leibowitz, Judge

No. E2008-01587-CCA-R3-CD - Filed August 4, 2009

The defendant, Andrew Lynn Kendall, pleaded guilty in the Knox County Criminal Court to four counts of statutory rape by an authority figure, *see* T.C.A. § 39-13-532 (2006), and the trial court imposed consecutive three-year sentences for an effective sentence of 12 years' incarceration. The trial court also declared the defendant a "child sexual predator," *see id.* § 39-13-523 (Supp. 2007), and ordered that he serve 100 percent of his sentence undiminished by any sentence reduction credits. In this appeal, the defendant asserts that the trial court erred by imposing consecutive sentences and by ordering 100 percent service of the 12-year effective sentence. We affirm the imposition of consecutive sentences but reverse the order of 100 percent service because the defendant does not meet the statutory definition of a "child sexual predator."

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed in Part; Reversed in Part

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Scott Carpenter, Assistant District Public Defender, for the appellee, Andrew Lynn Kendall.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Steven Sword, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On May 27, 2008, the defendant, originally charged with four counts of statutory rape by an authority figure and four counts of incest, pleaded guilty to four counts of statutory rape by an authority figure. Although the appellate record does not contain a transcript of the guilty plea submission hearing, the "agency statement" included in the presentence report contains the following recitation of facts:

> On 10/09/07[,] it was reported to investigators that a counselor at Karns High School had reported the victim ([C.K.], DOB

01/02/1991) had stated that her uncle (Andrew Kendall) had been raping her [at] least twice a month for a while. The victim had told her friends about the rape, but had never disclosed the information to any authorities.

On 10/09/07[,] authorities attempted to interview the victim at Karns High School; however, she had texted the defendant stating she had a headache and requested he pick her up early. Investigators then went to the defendant's residence at 2518 Myloshane, Knoxville, T[ennessee,] an[d] interviewed the defendant and the victim.

During the victim's interview with investigators she denied being molested by the defendant who had legal custody of her. She stated that her mother (Myra Smith) lived in New York, that her father had died the previous year, and she came to Tennessee to visit her uncle (the defendant), liked it here, and her mother let her stay.

When investigators interviewed the defendant, he stated that the victim is his deceased brother's daughter, that her mother was having difficulty dealing with her after her father's death and that the victim came from New York to Tennessee for a visit. The defendant said the victim liked it and wanted to stay. He reported he gained custody of the victim through Knox County Juvenile Court.

. . . .

On 10/10/07[,] the defendant was interviewed at the Knox County Sheriff's Office. He reported that his niece (the victim) came to live with him approximately two (2) years ago after the death of her father. The defendant said the victim maintained regular contact with her mother, and visited her occasionally. . . .

. . . .

When questioned further, the defendant admitted to being sexually involved with his niece since the fall of 2005. He said that "she came on to him" and he always told her "this is wrong, we can't do it again, this is the last time." He said the first time she approached him he was on the couch and she grabbed his penis and tried to kiss him. . . . The defendant reported performing oral sex on her once, she performed oral sex on him 7-8 times, having vaginal intercourse 20 plus times, and anal intercourse 2-3 times. . . . The defendant denied any attraction to other young girls. He said the victim is the only person he has been involved with who is a minor. He stated he wants

> them both to get help. The defendant stated their last intercourse was the previous week.
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> On 10/10/07[,] investigators spoke with the victim again. They told her the defendant admitted to having a sexual relationship with her, and that she would be unable to go back to the home. Investigators stated the victim appeared confused, but somewhat relieved. When told that the defendant was not angry with her, she then reported that they had vaginal intercourse 20 plus times, and oral sex 20 plus times. She reported that they had vaginal and oral sex more times th[a]n she could recall. The victim also stated that they had anal intercourse more than once, but she was not sure how many times. . . . She said the defendant asked her if she was okay, but usually there was no conversation after the sex, that the defendant would just get up and leave the room after he said[,] "It's wrong and won't happen again[."] The victim said[,] "I never told him no. I should have told him no, it is my fault[."] When asked who the primary ag[g]ressor was when it came to initiating sex, she stated "Both of us. Sometimes me, sometimes him." She stated they last had sex on Saturday 10/06/07. She said they "started on the couch" and then went into the bedroom where he asked her to put on a skirt. She said they had sex "regular and doggy[."] She clarified that "regular" was the missionary position. She stated the defendant took off his own shorts and she kept her skirt on.

At the July 10, 2008 sentencing hearing, the victim's mother, Myra Smith, testified that after the victim's father's sudden death in September 2003, the victim came to visit the defendant. Approximately one and one-half years later, the victim went to live with the defendant permanently "because she was at the point where she needed a change and stuff, instead of being where her father always was and stuff." Ms. Smith stated that she first learned of the sexual relationship between the defendant and the victim when she was contacted by authorities. After the defendant's arrest, the victim returned to live with Ms. Smith. Since that time, Ms. Smith observed that the victim was "really kind of in a shell" and that the victim had frequent nightmares. Ms. Smith asked the trial court to impose the longest possible sentence because the defendant "needs to pay for what he's done."

The 17-year-old victim testified that she came to live with the defendant because he reminded her of her deceased father. She stated that her sexual relationship with the defendant began shortly after she came to live with him and that it lasted two years. She testified that she and the defendant had sexual contact more than 50 times over the course of the two-year period. The victim said she told a friend about the relationship in October 2007, but she denied the relationship when originally questioned by authorities "because [she] was scared." She said that she was afraid for her cousin, the defendant's son, and his "not having a father." She testified that since returning to live with her mother, she "had nightmares" about the sexual acts and "basically tried to stay away from everyone."

As mitigation evidence, the defendant submitted documentation of his more than 20 years of meritorious service in the Army.

At the conclusion of this evidence, the trial court concluded that the defendant's lack of a criminal record, his years of military service, and his years of uninterrupted gainful employment justified setting each sentence at the minimum term of three years' incarceration. The trial court ordered the sentences to be served consecutively on the basis that the defendant committed four offenses involving the sexual abuse of a minor and that the abuse caused the victim to suffer from residual mental damage in the form of nightmares and an inability to get close to others. Finally, the trial court declared the defendant a "child sexual predator" and ordered the defendant to serve 100 percent of the 12-year effective sentence undiminished by any sentence reduction credits.

On appeal, the defendant contends that the trial court erred by imposing consecutive sentences and by requiring him to serve 100 percent of the sentences as a "child sexual predator." The State submits that consecutive sentencing was appropriate but concedes that the trial court erred by declaring the defendant a "sexual predator" and ordering 100 percent service of the sentences. We agree with the State.

When there is a challenge to the length of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2006). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.* If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The mechanics of arriving at an appropriate sentence are spelled out in the Criminal Sentencing Reform Act of 1989. At the conclusion of the sentencing hearing, the trial court determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b); -103(5); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

Consecutive Sentencing

Tennessee Code Annotated section 40-35-115(b) enumerates factual bases which authorize consecutive sentencing. In the present case, the consecutive sentencing factor upon which the trial court relied is as follows:

> The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of the defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims[.]

T.C.A. § 40-35-115(b)(5). In the absence of this or some other authorizing factor, state law requires the imposition of concurrent sentencing. *Id.* § 40-35-115(d).

In this case, the victim, who was 14 years old at the time, came to live with the defendant after her father died suddenly. She testified at the sentencing hearing that she wanted to live with the defendant because he reminded her of her father. The defendant took the necessary steps to procure legal custody of the victim. Only "[a] couple of months" after her arrival, the victim found herself in a sexual relationship with the defendant that encompassed oral, vaginal, and anal sex. She recalled that during the two-year relationship, the two engaged in sexual contact more than 50 times. The defendant admitted to authorities that he had a lengthy and extensive sexual relationship with the victim. The defendant preyed upon the vulnerable victim at a time when she was completely dependent on him and began a sexual relationship that remained undetected for nearly two years. Although the victim divulged the sexual contact to a friend, she initially denied it to authorities out of a desire to protect her cousin, the defendant's minor son, from the loss of his father. Both the victim and her mother testified that the victim suffered frequent nightmares brought on by the abuse and that the events have caused the victim to avoid close personal relationships with others. These facts support the imposition of consecutive sentences in this case.

Service of Sentence as a Child Sexual Predator

Tennessee Code Annotated section 39-13-523 provides, in pertinent part, as follows:

> "Child sexual predator" means a person who:
>
> (A) Is convicted in this state of committing an offense on or after July 1, 2007, that is classified in subdivision (a)(4) as a predatory offense; and
>
> (B) Has one (1) or more prior convictions for an offense classified in subdivision (a)(4) as a predatory offense;
>
> . . . .

(4) "Predatory offenses" means:

. . . .

(B) Statutory rape by an authority figure under § 39-13-532;

. . . .

(5) (A) "Prior convictions" means that the person serves and is released or discharged from a separate period of incarceration or supervision for the commission of a predatory offense classified in subdivision (a)(4) prior to committing another predatory offense classified in subdivision (a)(4).

T.C.A. § 39-13-523(2), (4)-(5) (2006). Here, the defendant was convicted on May 27, 2008, of four counts of the qualifying offense, statutory rape by an authority figure. Because the defendant had no prior conviction for any criminal offense, and certainly did not have any prior convictions for any of the qualifying offenses, the trial court erred by declaring the defendant a "child sexual predator" and ordering 100 percent service of the sentence.

Accordingly, we affirm the imposition of consecutive sentences but reverse the order of 100 percent service of the sentences.

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JAMES CURWOOD WITT, JR., JUDGE